

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1118

FEDERAL TRADE COMMISSION, *Petitioner*

v.

WARNER-LAMBERT COMPANY

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF OF WARNER-LAMBERT COMPANY
IN OPPOSITION**

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OPINIONS BELOW

The Opinion and the Supplemental Opinion on Petition for Rehearing of the court below (including the dissents of Judge Robb), set forth at Pet. App. 51a and 87a,¹ are reported at 562 F.2d 749. No opinion

¹ "Pet. App." refers to the appendix to the Petition for Writ of Certiorari in No. 77-855, which arises out of the same proceeding. (See Pet. 1 n.1) "J.A." refers to the Joint Appendix before the court of appeals.

accompanied the denial of the petition for rehearing filed by the Federal Trade Commission. (Pet. App. 97a) The Opinion and Order of the Federal Trade Commission (Pet. App. 1a) and the Initial Decision of the Administrative Law Judge are reported at 86 F.T.C. 1398.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1977. (Pet. App. 51a) Timely petitions for rehearing filed by Warner-Lambert and the Federal Trade Commission were denied on September 14, 1977. (Pet. App. 95a, 96a, and 97a) By order of December 8, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 11, 1978. The petition for a writ of certiorari was filed February 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

QUESTION PRESENTED

Assuming *arguendo* that the Federal Trade Commission has the power to order "corrective advertising," may the Commission require that such advertising include a "confessional preamble" indicating that prior advertisements were false where (i) the Commission made no findings of fact in support of the preamble and gave no reasons for including it in its Order and (ii) the advertising claims which are the subject of the confessional preamble were made in good faith and are supported by a responsible body of independent expert opinion.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press.

Section 5(a)-(b) of the Federal Trade Commission Act, ch. 311, 38 Stat. 719 (1914), as amended, provided,* in pertinent part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

(6) The Commission is empowered and directed to prevent persons, partnerships or corporations, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it . . . shall issue . . . an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice.

Section 8(c) of the Administrative Procedure Act, 5 U.S.C. § 557(c) (1976) provides, in pertinent part:

(c) . . . All decisions including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record. . . .

* After the complaint issued in this case, Section 5(a)-(b) was amended by adding the words "or affecting" before "commerce" and by repealing paragraphs (a)(2)-(a)(5) and renumbering paragraph (a)(6) as paragraph (a)(2). 15 U.S.C. § 45(a)-(6) (1976).

STATEMENT

In an Initial Decision filed with the Federal Trade Commission, an Administrative Law Judge of the Commission entered an order requiring that Warner-Lambert Company, for a period of two years, include in all advertisements for Listerine a statement that Listerine would have no beneficial effect on colds or sore throats. (J.A. 588-89) The order further required that the corrective statement contain the confessional preamble, "[c]ontrary to prior advertising." (J.A. 589) * The Initial Decision contained no findings of fact concerning the confessional preamble and gave no reasons for including it in the order.

On appeal to the Commission, Warner-Lambert objected to the order as a whole, and specifically objected to the requirement that the preamble be included. (J.A. 691-94) The Commission's Order differed from the Administrative Law Judge's order in minor ways not pertinent here, but included the confessional preamble. The Commission's Opinion did not address in any manner the preamble or Warner-Lambert's arguments concerning it.

Before the court of appeals, Warner-Lambert argued that "in the absence of both record support and explication by the Commission of reasonable need," the required preamble must be stricken. The court of appeals ordered the preamble stricken. The court held

* In his initial decision, the judge rejected a proposal by complaint counsel that the Federal Trade Commission be named as the source of the correction. The basis for the judge's ruling was his finding that "[s]uch a recitation would be unduly punitive in nature by requiring respondent to indicate that it has been found to be a law violator." (J.A. 585)

that the confessional preamble was "not necessary . . . to assure that the disclosure will reach the public." (Pet. App. 75a) The court further held that because "the record compiled could support a finding of good faith" in making the challenged claims for Listerine, "the confessional preamble to the disclosure is not warranted." (Pet. App. 76a) * A petition for rehearing by the Federal Trade Commission was denied by the panel without dissent. (Pet. App. 97a)

ARGUMENT

In support of its petition for a writ of certiorari, the Federal Trade Commission has argued that in striking the confessional preamble to the Commission's corrective advertising order, the court of appeals "discarded" established principles governing the review of Federal Trade Commission orders. (Pet. 9) In fact, the complete absence of findings by the Commission in support of the confessional preamble and the Commission's failure to state any reason for including it in the Order compelled its rejection by the court of appeals under the very principles invoked by the Commission. Moreover, the court of appeals recognized and properly held that the confessional preamble was particularly inappropriate on the facts of this case.

The Commission has requested that its petition be granted only if this Court grants Warner-Lambert's petition in No. 77-855. In so conditioning its petition, the Commission has in effect conceded that the questions raised by its petition do not in themselves merit

* The court of appeals affirmed the balance of the Commission's Order. This ruling is the subject of Warner-Lambert's petition for a writ of certiorari in No. 77-855.

consideration by this Court. Warner-Lambert's petition raises important constitutional and statutory questions concerning the Commission's fundamental authority to order "corrective advertising," a newly-asserted authority never before reviewed by the courts. The determination by the court of appeals that a particular phrase in the Commission's Order lacked a proper factual predicate and was not warranted in the factual context presented to the court does not raise questions of remotely comparable importance, and review of the court of appeals' determinations concerning those factual questions will contribute nothing to the consideration of the important issues raised in Warner-Lambert's petition. In these circumstances, the Commission's cross-petition should be denied.

1. The Federal Trade Commission has devoted a substantial portion of its petition to assertions that the confessional preamble stricken by the court of appeals "would serve" or is "necessary" to achieve one "salutory [sic] purpose" or another. (Pet. 5-7) Significantly, this portion of the petition contains no reference to any factual material before the Commission or to any finding or analysis made by the Commission itself.^{*} In fact, even though the requirement of a confessional preamble is an exceptional remedy not previously ordered in litigated cases (*see* Pet. 6 n.4), neither the Commission's Opinion nor the Initial Decision which preceded it referred to the preamble at all.

^{*} The complete absence of a factual or analytical predicate for the confessional preamble is highlighted by this and by petitioner's reliance on a single "editorial in an advertising trade publication" critical of the court of appeals' opinion (Pet. 6 n.5) as the only factual support for the preamble.

Orders of administrative agencies such as the Federal Trade Commission must be supported by findings of fact and accompanied by a statement of the basis and reasons for important provisions of the orders. Such findings and analysis are required by the Administrative Procedure Act, 5 U.S.C. § 557(c) (1976), and are essential if courts are properly to perform their reviewing function, *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 614 (1946); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Papercraft Corp. v. FTC*, 472 F.2d 927, 931-33 (7th Cir. 1973); *FTC v. Crowther*, 430 F.2d 510, 514 (D.C. Cir. 1970). This is particularly true when an order contains something which is "by no means a standard remedial provision." *Papercraft Corp. v. FTC*, 472 F.2d at 931. The use of "novel provisions" or an "exceptional remedy" cannot be accepted in the absence of "careful analysis" and "an adequate demonstration of the need" for such a remedy. 472 F.2d at 932-933. When such provisions have been upheld, the "exceptional relief was supported by findings describing an unusual history of predatory behavior," or there were other "findings [which] clearly supported" the exceptional relief ordered. 472 F.2d at 931 n.12.

Arguments by counsel on appeal cannot be used to justify an order in the absence of findings or analysis by the agency itself. Here, the Commission's "action must be measured by what [it] did, not by what it might have done." *SEC v. Chenery Corp.*, 318 U.S. at 93-94.^{*}

^{*} In *Chenery*, 318 U.S. at 94 (citation omitted), this Court explained that:

[t]he Commission's action cannot be upheld merely because findings might have been made and considerations disclosed

Petitioner also has wrongly criticized the court of appeals for its "belief that First Amendment considerations place 'a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved'" (Pet. 7). This Court and numerous lower courts long have recognized that determining whether a remedy bears a "'reasonable relation[ship]'" to the violation found, the standard as expressed by the Commission (Pet. 5), requires a determination of whether the relief ordered unnecessarily infringes upon important rights. *Jacob Siegel Co. v. FTC*, 327 U.S. at 612-613; *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933); *National Commission on Egg Nutrition v. FTC*, 1977-2 Trade Cas. ¶ 61,751 at 73,100 (7th Cir. 1977), supplemental opinion, 1978 Trade Cas. ¶ 61,877 (7th Cir. 1978); *Magnaflo Co. v. FTC*, 343 F.2d 318, 320-321 (D.C.Cir. 1965); *Papercraft Corp. v. FTC*, 472 F.2d at 931, 933; *Beneficial Corp. v. FTC*, 542 F.2d 611, 619 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977). There is no reason to assume, as the Commission does, that First Amendment rights are entitled to lesser protection.'

which would justify its order as an appropriate safeguard for the interest protected by the Act. There must be such a responsible finding. There is no such finding here.

' In *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), this Court charged lower courts dealing with restrictions on commercial speech with "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." Subsequently, this Court struck down such restrictions in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and in *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), in part because the restrictions imposed were not shown to be necessary to achieve the objective to be served. 431 U.S. at 95.

The court of appeals, in striking the "confessional preamble" from the Commission's Order, properly applied settled principles requiring that Federal Trade Commission orders be supported by appropriate findings of fact and an expression of the reasons for which the particular relief was ordered. The recognition by the court of appeals of a "special responsibility" to avoid unnecessary incursions on First Amendment rights properly followed recent decisions by this Court and is conceded to be consistent with applications of those decisions by other circuits in *Egg Nutrition* and *Beneficial* (Pet. 7 n.6).

2. In its discussion at Pet. 4-9, petitioner fails to address the consideration by the court of appeals of the propriety of a "confessional preamble" in the circumstances of this case. The court of appeals concluded that a confessional preamble "might be called for in an egregious case of deliberate deception, but this is not one." (Pet. App. 76a, footnote omitted) Rather, the court of appeals found that "the record compiled could support a finding of good faith" in making the advertising claims the Commission found "false." (Pet. App. 76a, footnote omitted)

The Commission's preamble would have required Warner-Lambert to "confess" that prior advertisements had been false. The court of appeals was presented with the following circumstances surrounding the advertisements found "false" by the Commission:

- (1) The advertising claims in question had been the subject of numerous reviews by the Commission, were included in an earlier compliance report accepted by the Commission,

and had been fully litigated before the Commission, *Lambert Pharmacal Co.*, 38 FTC 726 (1944), with the complaint dismissed. (J.A. 2738-40)

- (2) The Administrative Law Judge of the Federal Trade Commission had ruled that the company acted reasonably in relying on earlier studies which had been reviewed previously by the Commission and which supported the principal claims now found "false." (J.A. 562-64)
- (3) The claims found to be "false" were supported by a responsible body of expert opinion and by clinical studies, both of which the Commission elected to disregard in favor of the opinions of experts it had called to testify. (See portions of record cited at p. 11 n.11 of Pet. in No. 77-855.)
- (4) An expert panel appointed by the Food and Drug Administration subsequently determined that the principal study rejected by the Commission demonstrated that Listerine provided an "overall alleviation of symptoms" and, more particularly, "revealed milder nasal symptoms and cough symptoms in individuals using" Listerine, and included Listerine and certain of its active ingredients among those found, by the panel's own definition, "likely to be effective" for the relief of certain cold symptoms. 41 Fed. Reg. 38312, 38319, 38348-53, 38409-13 (1976).

The court of appeals was well justified in determining that "[o]n these facts, the confessional preamble to the disclosure is not warranted." (Pet. App. 76a)

In *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957), this Court held that "the circumstances under which . . . illegal acts occurred" are properly to be

considered in framing relief. Acts "in utter disregard of law . . . 'call for repression by sterner measures than where the steps could reasonably have been thought permissible.'" *Id.* (citation omitted). See *Papercraft Corp. v. FTC*, 472 F.2d at 931 n.12. Here, the court of appeals quite properly concluded that the circumstances surrounding the Commission's finding of a violation of the Federal Trade Commission Act were not such that it would be proper "to humiliate the advertiser" by requiring a public confession of wrongdoing (Pet. App. 75a-76a).

CONCLUSION

The conditional cross-petition of the Federal Trade Commission for a writ of certiorari does not present any question which is either important in itself or relevant to this Court's consideration of the constitutional and statutory questions presented in Warner-Lambert's petition in No. 77-855. In these circumstances, the cross-petition should be denied.

Respectfully submitted,

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